No. 14495.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MARCELINO CASARES-MORENO,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## BRIEF OF APPELLEE.

---

LAUGHLIN E. WATERS,
*United States Attorney,*
LOUIS LEE ABBOTT,
*Assistant U. S. Attorney,*
*Chief of Criminal Division,*
CECIL HICKS, JR.,
*Assistant U. S. Attorney,*
600 Federal Building,
Los Angeles 12, California,
*Attorneys for Appellee.*



Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

## TOPICAL INDEX

## TABLE OF AUTHORITIES CITED

### Cases



### Statutes

No. 14495.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MARCELINO CASARES-MORENO,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## BRIEF OF APPELLEE.

---

### I.
### STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on January 27, 1954, under Section 1326 of Title 8, United States Code. The indictment charged appellant with being an alien who, having been deported from the United States on December 31, 1953, attempted to enter the United States on January 3, 1954.

On February 17, 1954, appellant was arraigned in the Southern Division of the Southern District of California, and entered a plea of not guilty. On February 26, 1954, appellant's Motion for a Change of Venue to the Central

Division of the Southern District of California was granted. On April 20, 1954, jury trial was begun in the United States District Court for the Southern District of California before the Honorable Ernest A. Tolin. On April 22, 1954, the jury found appellant guilty as charged in the indictment. On May 17, 1954, appellant was sentenced to 185 days' imprisonment and Judgment was entered accordingly. Appellant appeals from this Judgment.

The District Court had jurisdiction of this cause of action under Section 1326 of Title 8, United States Code and Section 3231 of Title 18, United States Code. This Court has jurisdiction under Section 1291 of Title 28, United States Code.

## II.
## STATUTE INVOLVED.

The indictment in this case was brought under Section 1326 of Title 8, United States Code, which provides in pertinent part:

> "Any alien who—
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States * * *
>
> shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1000, or both."

## III.
## STATEMENT OF THE CASE.

The indictment returned on January 27, 1954, charges that the appellant was an alien who was deported from the United States to Mexico through the port of San Ysidro, California, on or about December 31, 1953. Thereafter, on or about January 3, 1954 near Calexico, Imperial County, California, appellant unlawfully attempted to enter the United States. On February 17, 1954, appellant appeared in the Southern Division of the Southern District of California where he was arraigned and entered a plea of not guilty. On February 26, 1954 appellant, through his attorney, J. Robert O'Connor, Esquire, moved the Court for a change of venue to the Central Division of the Southern District of California, and his Motion was granted.

Trial was begun on April 20, 1954, before the Honorable Ernest A. Tolin, United States District Judge, with a jury. Appellant was represented at the trial by his attorney, Carl Yanow, Esquire. On April 22, 1954, appellant was found guilty as charged in the indictment by the jury, and on May 17, 1954, appellant was sentenced to 185 days' imprisonment.

## IV.
## STATEMENT OF THE FACTS.

The Government's case in chief, which was not ordered transcribed by appellant, included portions of the files of the Immigration and Naturalization Service relating to appellant. Those records revealed [Govt. Ex. I-A] that appellant was found to be an alien, born in Mexico, and was, in February, 1953, ordered deported pursuant to law.

Ramon Mata-Avalos was called as a witness by the Government. He testified that on or about the date named in the indictment he, accompanied by a woman named Martin and appellant, drove to Tijuana, Mexico. After spending some time there, they drove to Mexicali and attempted to enter the United States at Calexico. They were apprehended at the Immigration Border Station at Calexico. The testimony of an Immigration officer tended to show that appellant had entered from Mexico.

Appellant testified on his own behalf and denied that he was an alien. He claimed that he was born on September 21, 1906 [Tr. p. 3]. He stated that he learned this from members of his family [Tr. pp. 14-15]. Appellant testified that in 1936 he began a proceeding in the Superior Court of Los Angeles County in the name of Miguel Casares to establish his birth record [Tr. p. 4], and a birth certificate was entered [Tr. p. 5, Deft. Ex. B]. He produced a baptismal record from the Plaza Church for Miguel Casares [Tr. pp. 3-4, Deft. Ex. C].

Appellant further testified that he did not go to Mexico on or about December 31, 1953, as charged in the indictment [Tr. p. 6]. He testified that on the night of January 2, 1954, he visited two cafes in Los Angeles, at the second of which he met Ramon Mata and Matilda Martin

[Tr. p. 9]. Appellant stated that about 10:30 or 11:00 P. M. he, Mata, and Martin decided to go to the Imperial Valley [Tr. pp. 8-9]. They took appellant's car, with Mata driving, and arrived in Calexico at about 4:00 o'clock in the morning [Tr. pp. 9 and 17]. Appellant further testified that after they arrived in Calexico they attempted to turn the car around near the Border Patrol Station and at that point were stopped by Immigration officers [Tr. p. 10].

On cross-examination appellant testified that he had told the Immigration Service in 1928 that he was a citizen of Mexico [Tr. p. 28]. He stated that in 1935 he was deported to Mexico [Tr. p. 29]. In 1926 appellant applied for a marriage license, using the name Marcelino Casares, and he gave his place of birth as Mexico [Tr. pp. 31 and 32, Govt. Ex. II].

In rebuttal the Government offered a certified copy of a death certificate of Miguel Casares revealing that he died in Santa Ana in April, 1907, at the age of six months. Sarah Lomas was called as a witness by the Government. She testified that she was a half-sister of the appellant and lived in the household of her mother at the time appellant was born [Tr. p. 47]. She testified that appellant was born in Mexico and that she was 14 years and six months old at the time of his birth [Tr. p. 48]. Mrs. Lomas further testified that prior to appellant's birth she had lived with her family in California where a child was born in Santa Ana by the name of Miguel and that Miguel died in Santa Ana while still an infant [Tr. p. 49].

## V.
## ARGUMENT.

Appellant's sole contention on appeal is that the order of the Superior Court relating to his birth certificate entered in 1936 is entitled to full faith and credit and binding against the World.

The constitutional requirement of full faith and credit found in Article IV, Section 1, of the Constitution applies only to the States, but that doctrine has been adopted by the Congress in Title 28, U. S. C., Section 1378, and made to apply to the Federal Courts. This section states in pertinent part:

> "Records and judicial proceedings or copies thereof so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, territory or possession in which they are taken."

It should be noted that the statute provides that judicial proceedings "shall have the same full faith and credit . . . as they have by law or usage in the courts of such state . . ." If California views the judicial proceedings employed by appellant as not conclusive, then, of course, such proceedings gain no greater stature by virtue of the above-quoted statute. Therefore, the first line of inquiry should relate to what effect such an order of the Superior Court would have in the State Courts of California. It is submitted that under the law of California, the order of the Superior Court would, at most, constitute only *prima facie* evidence of the facts it contained.

## A. The State Statute.

Defendant's Exhibit B is a certified copy of a birth certificate recorded in Los Angeles in 1936, pursuant to an Order of the Superior Court [Tr. pp. 5, 37]. In 1929, the California legislature enacted this procedure, and the law as it existed in 1936 may be found in the General Laws of California, 1931, Volume 3, Act 9008. Subsequent amendments up to 1939 did not change the procedure as found in the General Laws of 1931. There are no California cases interpreting this statute, and we must therefore, look to the intent and purpose of the Act.

The Act is entitled "Vital Statistics," and its purpose is described as follows:

> "An act to provide a central bureau for the preservation of records of marriages, births, and deaths, and to provide for the registration of all births and deaths . . ."

Section 21 of the Act relates to the procedure employed by appellant in instituting his action in Superior Court in 1936 and is entitled "Certified Copies of Records. Fees for Searching Files." That paragraph contains a command to Registrars of Vital Statistics to provide certified copies of birth, death and marriage certificates upon application, and provision for a fee for searching the record. As a subtitle to Section 21, is subsection (b). This section is entitled, "Petition to Court to Establish Record Hearing." It provides:

> "If, upon such search it shall develop that for any cause any birth or death, or marriage, occurring in this state was not registered in conformity with the provisions of law in effect at the time when such birth or death or marriage occurred by the filing of the certificate therefor with the local registrar within

> a period of one year from the date of the event, any person beneficially interested in establishing of record the fact of such birth or death or marriage may petition the Superior Court of the County in which such birth or death or marriage is alleged to have occurred for an order judicially establishing such birth or death or marriage."

There follows a provision requiring that such a petition be served upon the District Attorney and the local Registrar of Vital Statistics and notice by publication.

Thus it can be seen that the purpose of the judicial procedure is to establish a *record* of a birth, death, or marriage. It is a procedure available only when the record has not been otherwise maintained according to law. It is a *substitute* for prompt recordation shortly after the event.

A further examination of the statute makes appellant's position even more untenable. It is to be noted that the statute then, and even now, provides that "any person beneficially interested in establishing of record the fact that such birth or death or marriage may petition the Superior Court." Thus, it is not just births, but deaths and marriages as well which may be the subject of this judicial procedure. And the procedure may be initiated by any one "beneficially interested." Does appellant contend that the California legislature intended to permit any person with a beneficial interest to start an action and establish the death of an individual which would be binding upon all the World? Did it intend to create a marriage where none existed? Actions could be maintained under this section in the utmost good faith and the Superior Court could make an order in accordance with the affidavits and proof submitted at that time, but it could

not create a death or marriage where none existed. Neither could it create a birth and it was obviously not the intention of the California Legislature to do so.

Surely a belatedly entered record is not to be given greater weight than one recorded promptly. Section 21 of Act 9008 provides:

> ". . . such copy of the record of a birth or death or marriage when properly certified by the State or local registrar to have been so registered within a period of one year from the date of the event, shall be *prima facie* evidence in all courts and places of the facts therein stated."

Thus, the most that can be said of such a record of birth is that it is *prima facie* evidence of the facts therein contained, and this was the instruction given by the Court.

There are further reasons to support this conclusion. Section 18(a) provides for the correction of errors in records of vital statistics. It states:

> "Whenever, it may be alleged that the facts are not correctly stated in *any certificate of birth,* death, or marriage, *already registered,* . . ." (Emphasis added.)

The section then goes on to provide for the correction of such certificate by affidavit. It should be noted that this means of correcting certificates is available as to any certificate already registered, which of course, includes any certificate registered pursuant to a court order.

These statutory provisions are now codified in the Health and Safety Code and are found in Section 10600 *et seq.* Section 10600.5 was added to the Code in 1939, and it provides for the recordation in California upon an order of the Superior Court of births, deaths and mar-

riages *occurring outside the State of California.* This, too, is evidence that the California legislature at no time intended to give greater weight to a record created by an Order of the Superior Court than is given to one promptly recorded.

The Court in this case properly instructed the Jury as to the weight to be given the birth certificate introduced by appellant. The rule is announced in *Duncan v. United States,* 68 F. 2d 136, 140, where the court says:

> "Where such records are required by law to be kept, a presumption arises that they are an accurate record of the facts, and thus they become *prima facie* proof of the facts required by law to be so recorded."

One further matter should be noted. Appellant introduced the birth certificate, and it was stipulated that the certificate was "entered pursuant to an order of the Los Angeles County Superior Court" [Tr. p. 37]. He did not prove the terms and conditions of the order. Appellant did not establish a judicial finding of birth, but only that a *certificate* was ordered entered.

### B. Jurisdiction of the Superior Court.

Assuming, for the purposes of argument, that the California legislature intended such an order of court to be conclusive, the United States would not be bound thereby because it was not a party to the State Court proceedings. The doctrine of full faith and credit under 28 U. S. C. 1378 applies only when the State Court had jurisdiction over the party against whom the State proceedings are asserted. *Standard Accident Insurance Co. v. Doiron,* 170 F. 2d 206. The United States was not a party to appellant's action in the Superior Court in 1936.

The contention in this case is similar to the one made in *Economy Light and Power Co. v. United States,* 256 U. S. 113. In that case the Federal Court was called upon to determine the navigability of the DesPlaines River wherein the United States sought an injunction against the power company to prevent the construction of a dam. In prior litigation between the power company and the State of Illinois, the Supreme Court of that State held that the river was not a navigable stream. The Supreme Court observed at page 123:

> "Of course, the decision does not render the matter *res adjudicata,* as the United States was not a party."

It was basically on this premise that the Court rejected a similar contention in the case of *Ex parte Lee Fong Fook,* 74 Fed. Supp. 68 (remanded on other grounds without comment on this point, 170 F. 2d 245). In that case it was urged upon the Court that a birth certificate entered upon court order was entitled to full faith and credit and binding on the United States. At page 70 the Court said:

> "At the hearing in this Court, petitioner contended, as he did through his counsel before the Board of Special Inquiry, that the decree of the Superior Court of the State of California has established petitioner's birth in the United States, and that it was beyond the authority and power of the Immigration officials to pursue any inquiry as to the decree's validity . . .
>
> "The proceeding authorized by California State law for the establishment of the fact of birth, is not an adversary proceeding, save and except that the statute requires that notice of the hearing be given to the District Attorney of the County wherein the hearing is had. The United States not being a party to such proceeding, nor having consented thereto, is

not bound by the State Court adjudication. Particularly is this so as to the administration of laws of the United States, which it alone enforces. Constitution, Article I, Section 9, Clause 1.

". . . The State Court decree establishing birth is no more conclusive upon the United States as to citizenship or as to the right of entry into the United States than would be the finding of a State Court in a proceeding between private litigants wherein it might be necessary or proper in deciding property or personal rights, to find the date or place of birth of one of the litigants before the court. In my opinion the decree of the State Court is evidence of petitioner's birth place but not conclusive proof of his citizenship."

In the instant case Judge Tolin's Opinion is reported in 122 Fed. Supp. 375, and at page 377 Judge Tolin quotes extensively from the *Lee Fong Fook* case and adopts its language.

A somewhat analogous situation existed in the case of *Heath v. Helmick,* 173 F. 2d 157 (9th Cir.). That case involved a bankruptcy proceeding and one of the assets of the bankrupt's estate had earlier been the subject of a quiet title action in the State Courts of California. The Court observed at page 161:

"When the State Court failed to quiet title of Douillard to Glendale, no issue could have been decided which was binding upon this court, even if that judgment had been pleaded and proved, which was not the case. The parties are not the same. The positions are not identical."

*In rem* proceedings are an exception to the rule that a judgment is binding only on those who are actual

parties to the action. In *Williams v. United States,* 317 U. S. 287, the Supreme Court declared that divorce decrees, while not *in rem,* "are more than *in personam* judgments" (p. 298), since such decrees involve a status. Appellant in his brief renounces this position in the opening lines of his argument (p. 3). "The argument of appellant is that the State Court decree is an adjudication not of his citizenship but of his fact of birth." While citizenship might be construed as a "status" a determination as to the place of birth could not. Insofar as the Superior Court order purported to establish appellant's citizenship,

> "* * * jurisdiction to adjudicate the citizenship status of a United States resident has never been conferred by Congress on state courts. Consequently, a state court judgment purporting to exercise that jurisdiction cannot to that extent, claim the Federal Courts full faith and credit."
>
> *Ex parte Lee Fong Fook, supra,* pp. 70, 71.

It is a fundamental rule that judicial proceedings are entitled to full faith and credit only when due process of law has been accorded the litigants. As the Supreme Court said in *Old Wayne Mutual Life Association v. McDonough,* 204 U. S. 8:

> "No state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law."

This principle has been recognized also in California, *In re Hampton's Estate,* 127 P. 2d 38, and a later opinion in 131 P. 2d 565. It would seem to be clear from a reading of the statute authorizing the recordation of appellant's birth certificate that the State legislature of Cali-

fornia did not intend it to be a judicial proceeding entitled to full faith and credit, but even if the contrary is assumed, it would, as Judge Tolin observed, "most probably, run afoul of constitutional prohibitions."

Facts relating to births, deaths and marriages often have a determinative effect upon contractual rights, property rights and rights of inheritance. This alone would seem to negative any legislative intent that the *ex parte* procedure used to establish an unrecorded birth or death or marriage, as a proceeding binding against the world. In any event, it would infringe the constitutional requirement of due process as to third persons not a party to the petition to establish such a record.

## CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be affirmed.

LAUGHLIN E. WATERS,
*United States Attorney,*

LOUIS LEE ABBOTT,
*Assistant U. S. Attorney,*
*Chief of Criminal Division,*

CECIL HICKS, JR.,
*Assistant U. S. Attorney,*

*Attorneys for Appellee.*